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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1751

RINGSBY TRUCK LINES, INC., *et al.*,

Petitioners,

—v.—

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Questions Presented 1

Supplement to Petitioners' Statement of the Case 2

Reasons Why the Writ Should Not Issue 2

CONCLUSION 12

Certificate of Service 14

TABLE OF CASES

Brough v. *Strathmann Supply Co. Inc.*, 358 F.2d 374 (3 Cir., 1966) 12

Mechling Barge Lines, Inc. v. *United States*, 368 U.S. 324 (1961) 7, 8, 9, 10

Middlewest Motor Freight Bureau v. *United States*, 433 F.2d 212 (8 Cir., 1970), cert. den., 402 U.S. 999 ..... 5, 11

Public Service Commission v. *Brashear Freight Lines*, 312 U.S. 621 (1941) 4

St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U.S. 282 (1938) 12

Smith v. *Sperling*, 354 U.S. 91 (1951) 12

Texas Electric Ry. Co. v. *Eastus*, 25 F. Supp. 825 (N.D., Tex., 1938), aff'd per curiam, 308 U.S. 512 12

U. S. v. *Munsingwear*, 340 U.S. 36 (1950) 6, 7, 8, 9, 10

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Respondents oppose issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case on the ground the decision below is correct.

Questions Presented

Can a final judgment of a United States District Court foreclosing recovery on a restitutional counterclaim be immune from any appellate review whatsoever?

Supplement to Petitioners' Statement of the Case

In the first review of the assailed I.C.C. order the United States District Court for the District of Colorado entered a temporary restraining order September 9, 1966 postponing the I.C.C. rate cancellation order indefinitely. On September 19, 1966 the respondents, National Small Shipments Traffic Conference and Drug and Toilet Preparation Traffic Conference, filed their answer and their counterclaim in the District Court for damages resulting from the alleged improvidence of this restraining order. October 11, 1966 the District Court entered an order permitting respondents to intervene, and permitting the filing of their counterclaim.

In the second review of the assailed I.C.C. order by the District Court below respondents filed a motion to intervene February 6, 1968, which the District Court eventually granted September 4, 1968.

Reasons Why the Writ Should Not Issue

The Court of Appeals found that the "effect" of the 3% carrier increase under review "ceased to operate in August, 1967 when it was first superseded" by one of several subsequent increases (Appendix, page 10a). As a result of this, "the necessity for a three-judge court to provide injunctive relief against the 3% rate cancellation order was therefore obviated and determination of the validity of the I.C.C. order was of practical import only as it related to the restitutionary claim of the shippers for charges previously exacted" (Appendix, page 7a).

At page 9 of their petition for certiorari the carriers admit that "the increase to which the Commission's order was addressed had been superseded by further increases * * *." At page 14 they carry this admission to its mandatory conclusion: "It is true, as the Court said, that the 'necessity for injunctive relief against [enforcement of the] order was obviated' by supervening events."

The Court of Appeals found:

> "The sole remaining justiciable controversy when this case was heard in 1971 was the shippers' counterclaim for restitution. What was really at stake was the legality of charges exacted under the three percent rate increase between the time when the first rate cancellation order was scheduled to become effective and the time when the superseding increase became operative. [footnote omitted] It was during this time that, but for the direct and indirect effect of judicial action, the motor carriers would have been unable to charge the increased rate. The indirect effect was the provision in the second I.C.C. order which allowed for a stay if further judicial action was initiated prior to the Order's designated compliance date" (Appendix, pages 9a-10a).
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> "* * * In practical import the 'effect' of the increase ceased to operate in August, 1967 when it was first superseded. The increase is thus not a current, but rather a dated, one whose validity is important only to those who were charged thereon after the first I.C.C. rate cancellation order was scheduled to become operative and before the superseding increase. The crucial issue, therefore, was whether the rate was just

and reasonable during that period * * *" (Appendix, pages 10a-11a).

Petitioners do not disagree with this and at page 13 of the petition say, "the dispositive issue, indeed the only issue, was the validity *vel non* of the finding by the Commission that an increase in rates had not been shown to be just and reasonable * * *."

The Court of Appeals found that "the court below refused to entertain the shippers' restitutionary claim * * *" (Appendix, page 11). Petitioners agree that "shippers' complaint for restitution * * * was not entertained by the District Court" (Petition, page 10).

The Court of Appeals found that the shippers should have been enabled "to bring their claim for restitution before a single judge" (Appendix, page 9a). "This action belongs before a single judge * * *" (Appendix, page 11a). Again, petitioners agree, saying at page 10 of the petition:

> "Shippers' complaint for restitution is of course a separate and distinct 'case or controversy' between them and the carriers. [footnote omitted] That 'case or controversy' is not one for a three-judge court, *Public Service Commission* v. *Brashear Freight Lines,* 312 U.S. 621 (1941), and was not entertained by the District Court."

Entry of the judgment below by the District Court vacating the order of the I.C.C. had, however, practical consequences according to the Court of Appeals:

> "Any further action for relief brought by the shippers before a single judge would necessarily be subject to

dismissal on grounds that the order upon which the cause of action depends has been vacated. In this important sense, judgment of the three-judge court below is indisputably final. * * * To deny jurisdiction here would effectively signal the end of Appellants' cause of action without any judicial review" (Appendix, page 8a).

Petitioners do not concede this point made by the Court of Appeals; *however, they do not contest it!* Their silence in this regard is the most eloquent aspect of their petition. They appear to urge that a judgment should stand which bars a shipper counterclaim, even though that counterclaim was never entertained by the trial court, and even though that judgment is addressed to a controversy become moot (the future validity of a superseded I.C.C. rate cancellation order). Finally, they urge that this extraordinary result lies within the appellate jurisdiction of no court in the United States to review.

The important juncture where the petition for the writ takes issue with the reasoning of the Court of Appeals begins with the finding of the Court of Appeals that:

"In *Middlewest Motor Freight Bureau* v. *United States*, 8 Cir., 433 F.2d 212, *cert. den.*, 402 U. S. 999, closely related factually to the case at bar, a three-judge court below dismissed an action brought by motor carriers for injunctive relief against an I.C.C. rate cancellation order because superseding rate increases had mooted the issue of the cancellation order as between the I.C.C. and the carriers. [footnote omitted] In our opinion this procedure should have been followed in the case at bar". (Appendix, page 7a).

Petitioners suggest, "there was no need to determine, and the District Court did not determine whether the order requiring the increase to be cancelled was valid or invalid" (Petition, page 9). Nonetheless they insist, "there was a necessity for the Court to determine whether or not, in the words of 28 U.S.C. §2321, to 'annul or set aside in whole or in part [an] order of the Interstate Commerce Commission other than for the payment of money . . .'" (Petition, page 14). Only in a footnote at pages 9-10 of the petition do petitioners disclose their reason for this conclusion:

> "In these circumstances, the vacation of the Commission's order by the District Court was the appropriate disposition of the case. *United States* v. *Munsingwear*, 340 U.S. 36 (1950). As this court said in *Mechling*, that disposition assures that the parties are not 'concluded in subsequent litigation' by an order of the Commission that has not been finally determined to be valid or invalid. 368 U.S. at 329. Shippers are free to attack, and carriers free to defend, the lawfulness of the charges paid in a proceeding before the Commission ancillary to a suit for reparations authorized by §204a of the Interstate Commerce Act, 49 U.S.C. 304a."

Thus the carriers appear to say that the order of the Interstate Commerce Commission should have been vacated so that the carriers would not be "concluded in subsequent litigation" from freedom to "attack" or "defend" the lawfulness of the freight charge payments for which the shippers have counterclaimed, and this "freedom" from being "concluded," say the carriers, is mandated by *Mechling*

Barge Lines, Inc. v. *United States,* 368 U.S. 324 (1961) and *United States* v. *Munsingwear,* 340 U.S. 36 (1950).

Before testing the support which *Mechling* and *Munsingwear* supply for this argument, its most important aspect is its complete departure from the reasoning of the District Court below in support of whose judgment the argument is advanced. The Court of Appeals explained:

> "• • • the crucial issue in determining the validity of the rate cancellation order was whether the I.C.C. had given fair notice of its departure from standards employed in previous years relating to the quantum of evidence which would justify a rate increase. *This issue was never resolved* the court concluding that the question of fairness of notice was a 'debatable one.' The court instead based its judgment on *factors which we today hold were nongermane.* Construing its role as one of determining the propriety of injunctive relief against an I.C.C. order, the court's primary concern was the length of time which these rates had been in effect.
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> While it is true that the three percent increase has technically been in effect since 1964, in the sense that it has never been finally canceled, in practical import the 'effect' of the increase ceased to operate in August 1967 when it was first superseded. The increase is thus not a current, but rather a dated, one whose validity is important only to those who were charged thereon after the first I.C.C. rate cancellation order was scheduled to become operative and before the superseding increase. The crucial issue, therefore, was whether the rate was just and reasonable during that period and

> proper consideration of the rate cancellation order should have been limited to its validity at the time it was issued. *The deliberation of the court below was not so limited* and in view of this we cannot let stand a judgment with such preemptive collateral consequences. The shippers are entitled to their day in court." (Appendix, pp. 10a-11a, emphasis supplied.)

Thus the carriers do not today before this Court suggest that the District Court below was correct in ruling that the passage of time extinguished the shipper counterclaim and hence called for vacation of the Commission order upon which that counterclaim rests. Instead the carriers resort to *Mechling* and *Munsingwear*.

Mechling Barge Line v. *United States*, 368 U.S. 324 (1961) dealt with the requirement in Section 4 of the Interstate Commerce Act that carrier freight charges for the longer distance may not exceed freight charges for a shorter distance in the same traffic lane without prior Commission permission (the Long and Short Haul Clause). I.C.C. practice was to grant such Fourth Section permissions without hearing by an order containing no findings as to how the tariff in question met statutory standards for Fourth Section relief. January 9, 1959, the Commission granted such a Fourth Section permission to some railroads by Fourth Section Order No. 19059, declined to suspend the tariff involved, but began an investigation as to whether the subject rates were just and reasonable. Thus the rates became effective during the period of investigation. Ten months later a barge line competitor of the railroads petitioned a Federal District Court for an injunction setting I.C.C. Fourth Section Order 19059 aside on the ground that it

issued without hearing, unaccompanied by necessary findings. This complaint also sought a declaratory judgment against the Commission prohibiting issuance of future such Fourth Section orders.

Thereafter, revised rates eliminated the long-and-short-haul clause violation and the railroads withdrew their application for Fourth Section Order No. 19059, and moved the Federal District Court to dismiss the barge line complaint on the grounds that: (1) the assailed Fourth Section Order had become moot, and (2) the District Court lacked jurisdiction to grant the declaratory relief sought. The barge line, which had a cause of action against the railroads for damages resulting from lost business due to unlawfully competitive railroad rates, objected, saying that the railroads could use Fourth Section Order 19059 to defend against this barge line damage claim in future litigation, unless Order 19059 was declared invalid responsive to the barge line complaint. The District Court granted the railroad motion to dismiss and this Court affirmed in principle, but modified the District Court judgment by ordering Commission Order No. 19059 vacated in reliance on *United States* v. *Munsingwear,* 340 U.S. 36 (1950), which ruled that when mootness precludes appellate review, the trial court judgment under review should be vacated to avoid any risk that a plea of *res judicata* will be based on that judgment in subsequent, collateral litigation.

Thus in *Mechling* this Court said the principle of *Munsingwear* should be extended to District Court review of administrative orders, *mutatis mutandis*. "The District Court should have vacated the [I.C.C.] order which it de-

clined to review." (368 U.S. at 329).[1] This Court explicitly noted that vacating I.C.C. Fourth Section Order 19059 in no way foreclosed the issue of its validity in any damage litigation brought by the barge line *in the future* before *another tribunal.* The distinctions between *Mechling* and the case at bar are:

(1) In *Mechling* the barge line damage suit was prospective and speculative; in the case at bar the shipper counterclaim is present, pleaded, and matured.

(2) In *Mechling* the risk was of a finding of *res judicata* by another tribunal bound by the ruling of the court below; in the case at bar, the same tribunal (the District Court) decides both the shipper counterclaim and the issue of validity of the I.C.C. order under review.

(3) In *Mechling* there was no jurisdiction to review an inoperative agency order, because the reviewing court (the District Court) could grant no relief respecting it, just as in *Munsingwear* the Appellate Court could grant no relief respecting the district court judgment which had become moot; in the case at bar, the District Court below has jurisdiction to award damages on the basis of the operative, albeit dated, effect of the tariff under review. In other words, *Mechling* rests on *Munsingwear* and *Munsingwear* applies only where the reviewing tribunal can neither award nor withhold relief on the basis of the order under review. Here, neither *Munsingwear* nor *Mechling* apply because the reviewing tribunal, i.e.,

[1] As to declaratory relief, this Court ruled that sound exercise of discretion in *Mechling* called for withholding it for reasons irrelevant to the matter at hand.

> the District Court below, *can* award or withhold the damages sought by the shipper counterclaim, depending on the validity of the Commission 3% cancellation order under review.

This carrier error stems from a confusion of the remedy of reparations with that of restitution. The former is statutory under §204a of the Interstate Commerce Act, 49 U.S.C. §304a, cited in the footnote at page 10 of the petition herein. The latter is equitable and is designed to right the wrong of unjust enrichment. The difference between these two remedies in a transportation context has been established elaborately in *Middlewest Motor Freight Bureau* v. *United States,* 433 F.2d 212 (8 Cir., 1970).

The shipper respondents herein have no remedy of reparations. Section 204a(2) of the Interstate Commerce Act, 49 U.S.C. §304a(2), establishes two years as the period of limitations for such actions. Any right of action for reparations accrued to respondents in 1966 and has long since expired. Petitioners' suggestion is specious that they are in any jeopardy of *res judicata* in further litigation should their complaint herein be dismissed which seeks vacation of the Commission's rate cancellation order.

Petitioners say that "jurisdiction of a Federal court is determined by the situation existing at the time the suit is begun" (Petition, page 10). They imply that subsequent supersession of the assailed rate increase cannot alter jurisdictional parameters. At page 7 of the petition they make a closely related argument when, in their footnote, they say, "no party challenged the jurisdiction of the three-judge court while the case was before it."

Both arguments ignore the concession they make at page 10 that the "shippers' complaint for restitution is of course a separate and distinct 'case or controversy' between them and the carriers," and the further concession that this shipper complaint "was not entertained by the district court." Until the district court addressed itself to the shipper counterclaim there was no occasion to challenge its jurisdiction to act in the configuration of three judges. Nor do respondent shippers make any argument that rate supersession subsequent to commencement of the suit divested the three-judge court of any jurisdiction it possessed. The shipper counterclaim lies within the jurisdiction only of a single-judge district court and the carrier petitioners do not argue otherwise. Rate supersession has not ousted the three-judge district court below of jurisdiction to entertain the carrier complaint—it has only made appropriate the response to that complaint of a judgment of dismissal. Thus, *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 282 (1938); *Smith* v. *Sperling*, 354 U.S. 91 (1951); *Brough* v. *Strathmann Supply Co. Inc.*, 358 F.2d 374 (3 Cir. 1966); and *Texas Electric Ry. Co.* v. *Eastus*, 25 F. Supp. 825 (N.D., Tex., 1938), *aff'd per curiam*, 308 U.S. 512, cited at page 11 of the petition, have no bearing on this appeal.

CONCLUSION

The trial court vacated as invalid a Commission rate order for the wrong reasons, petitioners do not deny that the trial court's reasoning erred, and seek to support the trial court's judgment on a basis which the Court of Appeals says that the trial court has never adequately

entertained or evaluated. Respondents' counterclaim, which petitioners concede has never been entertained or evaluated by the trial court, depends critically on the validity of this Commission rate order and hence will be foreclosed by any judgment of the trial court which vacates that Commission rate order as invalid. This court has disclaimed direct appellate jurisdiction to review the judgment below. Petitioners seek a like such disclaimer from the Court of Appeals. The Court of Appeals must have appellate jurisdiction. Otherwise, denial of respondents' counterclaim would be immune to any appellate review whatsoever, a result repugnant to the purpose and uncalled for by any sensible construction of the Interstate Commerce Act or of the Judicial Code. Consequently, the petition for the writ lacks any merit, supplies no basis for belief that plenary analysis of the case on appeal would warrant reversal, and should be denied.

Respectfully submitted,

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June 21, 1974

Certificate of Service

I, WILLIAM Q. KEENAN, counsel for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of June, 1974, I mailed copies of the foregoing document, first class postage prepaid to the following:

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